International Journal of Trend in Research and Development, Volume 4(4), ISSN: 2394-9333
www.ijtrd.com

The Influence of the Tribal Dispute Resolution Mechanism on the Arbitration System in Yemen

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Abstract- The tribal influence of tribal dispute resolution mechanism (TADRM) on the arbitration system in Yemen is primarily considered in this research. Especially, Yemen is categorized as one of the highest tribal countries. The study employed a doctrinal approach and socio-legal research method by applying data collected through library while the doctrinal legal research applies legal case studies. Additionally, the study collects data through face to face semi-structured interviews with experts. The data were analyzed by using critical analysis. It was found that TADRM is more preferable than arbitration system and going to replace the formal arbitration system. This study helps to legislate stricter laws to combat the tribal interference on the arbitration as well as the adverse effects on justice. Also, it contributes to the knowledge of the extent of TADRM influence on arbitration as the researcher has not found previous studies focusing on the impact of customary law.

Keywords- *Arbitration; Customary Law; Influence.*

I. INTRODUCTION

The tribes are considered as an important part of the Yemeni society, it is hard to separate the tribes from the society,[1] since the tribes play a significant role in the Yemeni society.[2] The tribes do multiple tasks such as protecting their members, maintaining the security and stabilizing the surrounding circumstances, negotiating with the state regarding various matters that are important to the tribes,[3] settling most of the society disputes at a rate of 80%, by applying a customary law (tribal law).[4] According to Tribalism Index Scores, 2009 Republic of Yemen is ranked at number 7 out of 160 countries in the world, a ranking 1 considered as the highest rate, while a ranking 160 considered as the lowest rate.[5]

II. DEFINIATION OF TRIBE

Tribe is a group of people, mostly belong to one lineage due to the very top or the name of a tribal alliance that considered to be a grandfather of the tribe and consists of several clans.[6] Often members of the tribe live in a joint territory upheld their home, and they speak a distinctive tone, and they have a homogeneous culture or a common solidarity (i.e. Neurological) against external elements at least.[7]

III. THE TRIBAL DISPUTE RESOLUTION MECHANISM (TADRM)

The tribes are a part of Yemeni society so that the customary law as an inherent system based on transparent and culture.[8] The disputed parties choose the wise men in the community to resolve the dispute.[9] The customary law is not that perfect to solve the societal conflicts and brings justice as a whole, but is not worse than the official law.[10] Furthermore, the people prefer to solve their disputes through TADRM because of the lack of independent judiciary, which the government itself unwilling to implement the court's orders against the powerful people such as political persons and tribal leaders.[11] Therefore, the people refer to the tribal law instead of an official system because of various negative factors in the official system such as weakness, unqualified judges, non-enforcement of judgments, and slow procedures.[12] It is necessary to have case to explain that the tribe is above the law and the law is only can enforce against the weak person but not against the tribes' leaders and their members. The facts of the case are that the defendant is a tribal leader (Yaser Al-Awadhi)

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1 James McCune, Tribes and Tribalism in Yemen. A Joint FCO Research Analysts and Stabilisation Unit Workshop (April 26, 2012) http://webarchive.nationalarchives.gov.uk/20141014133309/http://www.stabilisationunit.gov.uk/attachments/article/523/Tribes%20and%20Tribalism%20in%20Yemen%20%20workshop%20report_FCO%20and%20Stabilisation%20Unit_2012.pdf (accessed on November 1, 2015).

2 Elham M. Manea, Yemen, the Tribe and the State.This paper was presented to the International Colloquium on Islam and Social Change at the University of Lausanne (October 11, 1996). http://www.al-bab.com/yemen/soc/manea1.htm (accessed November 6, 2015).

3 Amr Hamzawy, *Between Government and Opposition: the Case of the Yemeni Congregation for Reform* (Carnegie Endowment for International Peace, 2009), 4.

4 Laili al-Zwaini, State and Non-State Justice in Yemen. Paper for the Conference on the Relationship between the State and Non-State Justice Systems in Afghanistan (December 10-14, 2006): 2-10 http://www.usip.org/sites/default/files/ROL/al_zwaini_paper.pdf (accessed November 11, 2015)

5 David Jacobson and Natalie Deckard, "the Tribalism Index: Ulocking the Relationship between Tribal Patriarchy and Islamists Militants," New Global Studies 6.1 (2012): 10-11.

6 Seth Godin, The Tribes Casebook, http://sethgodin.typepad.com/seths_blog/files/CurrentTribesCasebook.pdf (accessed February 14, 2016).

7 Ibid.

8 James McCune, Tribes and Tribalism in Yemen. A Joint FCO Research Analysts and Stabilisation Unit Workshop (April 26, 2012) http://webarchive.nationalarchives.gov.uk/20141014133309/http://www.stabilisationunit.gov.uk/attachments/article/523/Tribes%20and%20Tribalism%20in%20Yemen%20%20workshop%20report_FCO%20and%20Stabilisation%20Unit_2012.pdf (accessed on November 1, 2015).

9 Ibid.

10 Ibid.

11 Brian Katulis, Countries at Crossroads 2004- Yemen (2004) http://www.refworld.org/docid/473868f963.html (accessed October 18, 2016).

12 Gaston and Al-Dawsari, Dispute Resolution and Justice Provision in Yemen's Transition, 3.

and the plaintiffs are the parents of two dead persons at the age of nineteen. In this case during ceremony marriage for Al-Awadhi family on 14/5/2013 and that hold place in Sana'a. The guardians of *Sheikh Yaser Al-Awadhi* (tribal leader) intercepted the two dead persons' car and shoot them without apparent reason. The parents started to file an action in the court, but the police did not take any investigated action of the crime incident. Till this moment, the case has not tried yet.[13]

Also, the official justice system is slightly existed in northern areas that dominated by the tribes where the number of existing courts is very limited.[14] In the urban governorates, the tribal law is often existed while in the southern governorates is quite existed but is still weak too.[15] As a consequence of the weakness of the official justice system and non-enforcement of the court judgments, trial cases in the court system are declining.[16] In 2013 trial cases in Aden province declined at a rate of 44%, Sana'a 41%, and Taiz 35%.[17] The tribal arbitration mechanism could be used to solve disputes among tribal members themselves as well as disputes between tribes and the state.[18] Therefore, some officials recommend application of TADRM to solve some disputes like kill issues.[19] Some judges unofficially advise the disputed parties to settle their dispute by TADRM as long as it is recognized by the official law.[20]

In addition, the tribal conducts and operations are well recognized by the government. Even, the government itself requires a tribal interference to settle complex issues that arise between the tribes and the government.[21] The government also invites the tribes to settle the tribes and the business issues within the tribal region.[22] For instance, in May 2010 American drone killed Yemeni deputy governor in Marib provenance.[23] The former president Ali Abdullah Saleh proposed to settle the dispute that arose between the government and the deceased's tribe by TADRM.[24]

IV. THE INTERRELATIONSHIP OF THE CUSTOMARY LAW AND THE OFFICIAL LAW

The justice in Yemen is merged system between the tribal law and the official which sometimes, the court refers to the sheikhs to settle the dispute between the victim and the offender.[25] Hence, the judiciary in Yemen applies formal system and customary system.[26] The dominant of the tribal law because the tribes control the rural areas which the government cooperates with tribal leaders to secure some areas that are out of the government control.[27] People prefer to solve their disputes by TADRM because they consider the government institutions are weak and the government center does not have full control over all the state's local territories.[28] It is commonly known that the urban prefer to settle their dispute by the formal system, especially that commercial issues like commercial arbitration. However, Yemeni people prefer to resort to their commercial disputes to tribal mechanism because the tribal mechanism is more effective than the formal system.[29] As usually the tribal leader who appointed as arbitrator takes an interim measure of protections such as arms or cars from the disputed parties to ensure the enforcement of the award (*Hukm*).[30] Therefore, the studies have shown that 80% of disputes are solved by the customary law mechanism.[31] But, the made decision by the tribal arbitrator can be appealed twice to two higher layers of tribal justice if one or both of the disputed parties disagree.[32] Furthermore, the judiciary in Yemen suffers from corruption and other factors so that the judges receive bribery, unqualified, makes an ineffective judgment, the cost is high, and political interference can change the verdicts.

Moreover, some judges and prosecutors, as well as lawyers, were threatened by local Sheikhs to release some cases in order to be settled by the tribal law or to hold a decision in their favour. It can mean that the judiciary is a weak institution.[33] Even, in some cases found that judges unofficially advise the disputed parties to solve their dispute outside the court.[34] The Yemeni law itself does not mind to settle disputes by other means of ADR.[35] An article (45) provides that the arbitral tribunal has to settle the dispute based on the laws that agreed by the disputed parties, if the disputed parties did not mention the govern law, then the arbitral tribunal has to settle it based on the international law and the principles of justice and has to take into consideration the custom law.[36] The judge Yehya Al-Mawri, who holds a position as a Supreme Court member says that the Yemeni Arbitration Act 1992 strengthened a tribal relationship with the state through the law.[37] In addition, the Yemeni law is not adequate as well as ineffective so that the official law is not the supreme law in the country which this is one of the main reasons why the people prefer to settle their dispute by the

[13] Case of Killing Two Persons from Aden, *Aden Alghad*, May 17, 2013, http://adengd.net/news/50459/#.VoDH1_lYrIU (Accessed January 27,2016).
[14] Gaston and Al-Dawsari, Dispute Resolution and Justice Provision in Yemen's Transition, 5.
[15] Ibid.
[16] Ibid, 9.
[17] Ibid.
[18] Ibid, 3.
[19] Ibid, 6.
[20] Ibid.
[21] Gaston and Al-Dawsari, "Tribal governance and stability in Yemen, 8.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Travis Morris and Rebecca Tramme, "Formal and Informal Justice and Punishment Urban Law and Rural Mediation Rituals in Yemen," *Race and Justice* 1.2 (2011): 132.
[26] Ibid.
[27] Ibid, 135.
[28] Gaston and Al-Dawsari, Dispute Resolution and Justice Provision in Yemen's Transition.
[29] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 8.
[30] Ibid.
[31] Ibid.
[32] Gaston and Al-Dawsari, Dispute Resolution and Justice Provision in Yemen's Transition.
[33] Ibid, 4.
[34] Ibid, 6.
[35] Ibid.
[36] Article (45) of Yemeni Arbitration Act 1992.
[37] Nadwa Al-Dawsari, "Tribal governance and stability in Yemen," *the Carnegie Papers, Carnegie Endowment for International Peace* (April 2012): 8.

tribal law.[38] To sum up, the formal legal system is not existed in Yemen.[39]

V. FINDINGS

TADRM is going to replace the arbitration system and the formal law as a whole. This is because the negative factors that adversely affect the justice such as corruption and non-enforcement of the law. Even though, the tribal leaders are not qualified to deal with legal procedures and processes. Based on an interview in regards to the confidence of the court system. 29% of respondents confirmed that they are not comfortable with the court litigation, 19% are less comfortable, 22% are much comfortable, 7% are very much comfortable.[40] This means that the government is unwilling to combat the spread of corruption in the government institutes. Thus, the people do not trust the formal law to settle their disputes fairly. another an interview conducted by the authors, The all interviewees of Court of Appeal judge, academicians, and arbitrator suggested that *in order to improve the arbitration system in Yemen, they are all recommended that the development of institutional arbitration and stay away from non-institutionalized arbitration like refer to The tribal alternative dispute resolution Mechanisms because tribal men are not aware of legal procedures and pleading which the court faces difficulties to implement the arbitral award and lead recourse the award so* suggested to repeal section 45 of YAA that provides the recognition of *TADRM*.[41] Thus, YAA has to be amended as there are sections adversely affect the arbitration system in Yemen such as section 45 of YAA that recognizes the tribal award which is equivalent to primary court judgement.

The experts of the rule of law are inconvenienced with the recognition of the tribal customary law. They consider the tribal arbitrator as ignorant of the processes and proceedings of the tribal customary law. The tribal customary law is more expected to set aside because of breach of the justice proceedings. However, the experts criticized the role of tribal customary law, but failed to refer to the necessary reforms that have to be taken to improve the judiciary. Especially, to combat the rampant corruption in the judiciary. Indeed, the tribal customary law is the fundamental element the keep the stability in Yemen. As commonly known, after the Arab Spring the all government institutions and the security are collapsed till now. Nowadays, the tribal customary law is performing the functions of the government institutes such as settling the disputes among the citizens and keep the security. The situation in Yemen is better than Arab countries that affected by Arab Spring. Even though, the ongoing war of six years ago at this moment.

CONCLUSION

The lack of the enforcement of the law lets the people prefer to solve their disputes by customary law that supervised and administered by sheikhs as they have the power. Also, the state does not fully extend its sovereignty over the territory as mentioned above. Throughout the tribal mechanism arbitration, often Sheikhs take an interim measure of protections of the disputed parties to make sure to enforce the decision made as well as it is traditionally considered as shameful if the debtor party rejects the sheikh's decision. Thus, the collapse of the judicial institution because the citizens don't trust anymore the formal court.

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40 Daniel Corstange, "Tribes and the Rule of Law in Yemen," prepared for delivery at the annual conference of the Middle East Studies Association, Washington, DC. (November 2008), 34.

41 Interview with Court of Appeal judges, academician, and arbitrator, December 11-20-25-27, 2016.